REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 89 OF 2012

RAPHAEL ANDEBE...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Criminal Case number 814 of 2012 of the

Principal Magistrate's Court at Maseno – A.R. Kithinji -PM)

J U D G M E N T

The appellant was charged with the offence of Burglary and Stealing contrary to section 304 (2) and section 279 (b) of the Penal Code.

The particulars were that on the night of 7th and 8th day of March 2012 at Unknown time at Muchula village Essaba sub location, Tongoi location within Vihiga county broke and entered the dwelling house of Phanuel Abisai with intent to steal therein and did steal a bed, assorted house utensils and sofa skeleton, the property of the said Phanuel Abisai all valued at Kshs. 22,000/=.

On his own plea of guilty the appellant was convicted and sentenced to 7 and 4 years respectively.

The appellant has filed 6 grounds which Mr. Nyanga counsel for the appellant argued them strongly.

It must be noted too that prior to the hearing of this appeal the appellant sought and obtained leave to introduce fresh and new evidence. The evidence which were introduced were a probation report as well as an affidavit of one Doris Eboko Indata the grandmother to the appellant.

Respectfully, I do not think that the said evidence were new in any way and even if they were they were not going to aid the appellant as he admitted the facts. He pleaded guilty.

While on the question of plea it has been argued that the same was not equivocal. Looking at the proceedings though I do not agree with the appellant. The trial court clearly indicated the appellant understood the kiswahili language.

However, the subsequent proceedings is where the court failed to indicate the language used. Infact it is not at all clear when the facts were being read which language the court was using. This was on 11-7-2012.

It is again on this date that the appellant was required to mitigate. In his mitigation the language used is not indicated and therefore it is difficult to ascertain whether or not he understood the facts as read out by the prosecution.

When it came to mitigation the appellant state: “I had some problems”.

I do not find this to be a statement that one can call mitigation. The court being a last resort ought to have inquired and gone further than this. As much as I have discredited the further evidence adduced by the appellant it thus appear that there was a land dispute between the appellant and the complainant.

Mitigation always must be clear and unequivocal. Anything that seems unclear can be construed to be a plea of not guilty. In the premises I do not find the mitigation by the appellant to be as clear as expected.

Finally, the appellant argued that the facts did not support the charge. I have perused both and I noticed that the nowhere did the charge talked of a sofaset but a skeleton sofa. Worse there were no exhibits produced in court's

I shall therefore allow the appeal on the grounds that the language used subsequently after plea was not clear and further that the facts did not support the charge. The appellant is acquitted and released unless lawfully held.

Dated, signed and delivered at Kisumu this 3rd day of March, 2014.

H.K. CHEMITEI
JUDGE